In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1324

CHESTER DEWITT MENK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15-20) is reported at 406 F.2d 124. The district court wrote no opinion.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1968, and a petition for rehearing

was denied on January 29, 1969.[1] On March 5, 1969 (pursuant to a telegraphic request received on February 28), Mr. Justice Marshall extended the time within which petitioner might file a petition for a writ of certiorari until March 13, 1969. On March 14, 1969, Mr. Justice Fortas further extended this time until March 23, and on March 25 Mr. Justice Marshall granted an additional extension until March 30. Despite these extensions, the petition was not filed until April 28, 1969,[2] and is thus out of the time under Rule 22(2) of the Rules of this Court.

QUESTION PRESENTED

Whether the court of appeals correctly concluded that, in the circumstances of this non-jury trial, the improper introduction of evidence relating to prior crimes committed by petitioner and other irrelevant matters did not require reversal of his convictions.

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[1] See the unpaginated record of the court of appeals proceedings on file in the Clerk's office.

[2] The petition had been received by the Clerk prior to the expiration of the period (as extended) within which it was required to be filed, but no certified record had been received as of that date. When the record still had not been received as of April 17, 1969 (eighteen days after the time for filing, as extended, had expired), the Clerk returned the lodged copies of the petition to petitioner's counsel. On April 22, a certified copy of the record of the proceedings in the court of appeals and a certified copy of petitioner's court of appeals brief (containing a narrative transcript of the trial proceedings as an appendix) were received by the Clerk. On April 28, the copies of the petition which had been returned were again submitted; the petition was thus not effectively filed until that date. See Rules 21(1) and (2) of the Rules of this Court.

STATEMENT

Following a non-jury trial in the United States District Court for the Southern District of Indiana, petitioner was convicted on Counts 2 and 3 of a four-count indictment charging that he and two co-defendants sold amphetamine tablets, in violation of 21 U.S.C. (Supp. III) 331(q)(2)[3] (Tr. 206, 261-262, 264, 270).[4] Count 2 charged a sale by petitioner and co-defendant Minnie Bingham on July 26, 1966, and Count 3 a sale by the same persons on October 5, 1966 (Tr. 206).[5] On December 1, 1967, petitioner was sentenced to two years' imprisonment on each count, the terms to run consecutively (Pet. 7; Pet. App. 15). The court of appeals affirmed (Pet. App. 15-20).

On June 18, 1966, an agent of the Federal Bureau of Drug Abuse Control, Department of Health, Education and Welfare, acting in an undercover capacity, visited the Shifting Sands Truck Stop, a restaurant operated by petitioner, and asked co-defendant Minnie Bingham, an employee, whether she could procure stimulant drugs, particularly amphetamines, for him (Tr. 29-32, 63-65, 67-68). Mrs. Bingham told the

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[3] Section 331(q)(2) of 21 U.S.C. (Supp. III) prohibits the sale of a drug in violation of Section 360a(b). Section 360a(b) forbids the sale, with inapplicable exceptions, of any depressant or stimulant drug. A "depressant or stimulant drug" is defined in Section 321(v)(2) to include any drug containing amphetamine or any of its salts or optical isomers. The penalty provisions are contained in Section 333.

[4] "Tr." refers to the transcript of the trial proceedings, a copy of which is being lodged herewith.

[5] Counts 1 and 4 did not involve petitioner.

agent she could supply him with all the drugs he wanted and gave him two amphetamine tablets as samples of what was available (Tr. 65-66). On July 8, 1966, the agent returned to the restaurant and bought 100 tablets of the drug from Mrs. Bingham, who at that time identified petitioner as her supplier (Tr. 32-37).

On July 26, 1966, the agent again discussed drugs with Mrs. Bingham and later that evening met petitioner (Tr. 43-44). Petitioner told the agent that he had to be very careful because the police were trying to initiate an "undercover case" against him. He explained that he had been arrested once before for selling drugs after being "set up" by one of his friends. He said that because of certain "state charges" that were currently pending against him (apparently relating to slot machines) he was letting Mrs. Bingham run the restaurant and his illegal drug business (Tr. 44-45). In response to the agent's expressed wish to buy 1,000 amphetamine tablets, petitioner absented himself momentarily, returned with a paper bag, and told the agent to "[s]ee Minnie" about the pills. The agent paid Mrs. Bingham the agreed-upon purchase price and secured the tablets from a hiding place on the premises where Mrs. Bingham told him they would be found (Tr. 46-48).

During the conversation which eventuated in the foregoing transaction, petitioner stated to the agent that if he could identify the person who had betrayed him in connection with the drug sale for which he had previously been arrested he would kill him, and that if it happened again he would kill the person who turned him in and the officer. He also told the agent

about an instance in which he had once prevented the arrest of his brother by two excise officers by hitting one of the officers over the head with a shotgun (Tr. 44-45). An objection by petitioner's counsel to this evidence of "other alleged crimes"—on the ground that there was "no connection between an alleged assault and battery and going to kill an informer and the case here"—was overruled (Tr. 45-46).[6] On October 5, 1966, petitioner sold the agent an additional 1,000 tablets, the agent again delivering the purchase money to Mrs. Bingham in accordance with petitioner's instructions (Tr. 50-54, 58).

Testifying in her own behalf, Mrs. Bingham admitted selling amphetamine pills to the agent (her defense was entrapment), but denied that she had acted for petitioner in the transactions (Tr. 152-153, 157-159, 165, 167-168, 178-184, 187-192).[7] Petitioner, similarly testifying in his own defense, denied having had anything to do with the sales (Tr. 206). His theory of defense, as stated in his brief in the court of appeals, was that as "a long-time lawbreaker" he had become apprehensive of impending prosecution and had therefore exercised no control over any of the illicit activities conducted at his establishment (see Pet. App. 17). He testified on direct examination

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[6] Contrary to petitioner's statement that the trial court repeatedly overruled defense objections to collateral inquiry concerning crimes other than those charged (Pet. 3), this is the only instance reflected in the record of a defense objection based on this ground.

[7] Mrs. Bingham claimed that she procured the drugs from other employees of the restaurant (Tr. 153, 178-183, 187-189).

that he had served 30 days on a penal farm for being involved in a dance hall fight in 1929; that he had been convicted of grand larceny in 1933; that in 1958 or 1959 he had been convicted for an offense involving an attack on two excise agents; and that he had pleaded guilty in 1960 to selling "these pills," for which he had been sentenced to two years in a federal penitentiary (Tr. 207-208). He acknowledged that he had bought slot machines (apparently illegally) at some unspecified time in the recent past and that he was currently charged with possession of a slot machine without a stamp (Tr. 211, 229-230). He said he hired waitresses for his restaurant by picking up "any tramp that comes along the road" and letting them run the place (Tr. 218).

The trial judge, in rendering his verdict, noted that the issue before him was essentially one of credibility —whether to believe the agent or the defendants (Tr. 264-265). Following a detailed discussion of petitioner's and Mrs. Bingham's testimony, he concluded that he could not accept their versions of the events insofar as they conflicted with the agent's, which he found credible and convincing (Tr. 265-270).

The court of appeals held that the admission during the government's case in chief of evidence of offenses by petitioner other than those charged had been error, and that reversal would have been required had the trial been before a jury; it concluded, however, that since trial had been to the court and it appeared from the record that the judge had not considered the erroneously admitted evidence in an improper way in reaching his verdict, reversal was not warranted (Pet. App. 17-19).

ARGUMENT

As shown previously (*supra*, pp. 1-2), the instant petition was not filed on time. At all events the issue sought to be presented is without substance.

Even assuming *arguendo* that the court of appeals was correct in ruling that the admission of evidence of other offenses by petitioner during the government's case in chief was erroneous, despite several theories on which such admission might be justified, the court of appeals properly held that error not to require a reversal. A judge, as distinguished from a jury, as the court noted (Pet. App. 19), must be presumed to have exercised appropriate discretion in distinguishing between proper and improper evidence introduced at trial and, in the absence of a clear showing to the contrary, to have based his decision only on the former. *Alexander* v. *United States*, 241 F.2d 351, 356-357 (C.A. 8), certiorari denied, 354 U.S. 940; *Clark* v. *United States*, 211 F.2d 100, 106 (C.A. 8), certiorari denied, 348 U.S. 911; *Murray* v. *United States*, 117 F.2d 40, 45 (C.A. 8). Nothing in the remarks made by the trial judge in announcing the verdicts indicates that he made improper inferences from the government-elicited evidence of petitioner's prior offenses. The only issue recognized by the judge, as the court of appeals observed (Pet. App. 18), was that of credibility, and the only evidence used to determine that issue was, with but one exception,[8] the testimony of the de-

[8] The exception relates to the judge's reference to petitioner's waitresses as prostitutes (Tr. 267-268). The judge noted that they had been so characterized by the agent (see Tr.

fendants themselves (Tr. 265-269). The judge's reference to petitioner's "criminal mind"—the allusion primarily relied upon (Pet. 2, 6, 9)—reflects on its face that it was from petitioner's own direct testimony that the judge inferred his criminal mentality (Tr. 267): "The criminal mind just does not work that way, and we are dealing here with a criminal mind, *on his own admission that he has heretofore been convicted of various offenses*, some of which are felonies." [Emphasis added.]

The quoted comment also indicates that the judge did not infer petitioner's guilt of the offenses charged from a mere general criminal propensity or predisposition—the inference which the law forbids (cf. 1 Wharton, *Criminal Evidence*, § 232 (12th ed. 1955); 1 Underhill, *Criminal Evidence*, § 205 (5th ed. 1956)). The comment was made in the context of a discussion of petitioner's *credibility*. It is well settled that prior convictions of a witness, including those of a defendant who takes the stand, may properly be considered in determining the extent to which his testimony should be credited (3 Wharton, *supra*, §§ 934-939; 1 Underhill, *supra*, §§ 244-245).

At all events, the admission of the government-elicited evidence of prior offenses by petitioner can hardly be considered prejudicial in the context of a

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112-113), and that the defendants had not denied this (Tr. 268). It is to be noted, moreover, that petitioner not only did not deny that the waitresses were prostitutes, he implicitly confirmed the fact (and sought to turn it to his advantage) by his testimony on direct examination that he hired his female help by picking up "any tramp that comes along the road" (Tr. 218).

case in which the accused's basic defense strategy involved a showing that he had been "a long-time lawbreaker" (*supra*, pp. 5-6). Where the accused's theory of defense is based on the portrayal of himself as a persistent violator of the laws, the admission of prosecution evidence which tends to support that portrayal must be deemed harmless.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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